IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 65 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MANSINGH P CHAUHAN - Appellant
Versus
GOPALBHAI PATEL, PROPRIETOR SHIV SHAKTI ELECTRI & 1 - Respondents

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Appearance :

MR ADIL R MIRZA for Appellant:
MR AMIT N PATEL for Respondent: 1,
MR MA PATEL, LD. APP for Respondent: 2.

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CORAM : HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

Date : 12/02/2007

ORAL JUDGMENT

1. The appellant has preferred this appeal under section 378 of the Criminal Procedure Code

(herein after referred to as the 'Code' for brevity) challenging the order dated 22/11/2005 passed by learned JMFC, Pardi, dismissing the complaint registered being Criminal Complaint no. 65 of 2002 on account of appellant's (original complainant's) failure to remain present before the court on that day.

2. The appeal was admitted by this Court on 16/1/2007 (Coram: S.R. Brahmbhatt, J) and leave was granted. The records & proceedings were ordered to be called for from the trial court so as to reach this Court on or before 29/1/2007 and the appeal was fixed for final disposal on 31/1/2007.

3. Heard learned counsels for the parties. The brief facts leading to filing of this appeal deserves to be set out as under:

The appellant / original complainant was constrained to file Criminal Case No. 65 of 2002 before learned JMFC, Pardi against respondent no.1 as the cheque of Rs.50,000=00 issued by the respondent in favour of the appellant was not honoured and returned unpaid. After issuing statutory notice demanding payment against the cheque and on non-receiving money said complaint was lodged. The summons was issued. The trial court, as it appears from the order, dismissed the same as the complainant and his advocate

did not remain present when the matter was called out on 22/11/2005. This order of dismissal is impugned in the present proceedings.

4. Shri. Mirza, learned counsel for the appellant has submitted that expect on the fateful day i.e. 22/11/2005 on all other occasions the appellant had been vigilant to remain present before the court and, therefore, on account of this single lapse, the trial court ought not to have dismissed the complaint when the record clearly show that the cheque was issued in favour of the respondent/accused and the cheque amount had remained unpaid. Shri. Mirza has submitted that the appellant has been remediless in view of the order impugned. Shri. Mirza has further submitted that the trial court ought to have appreciated the fact that the appellant and his advocate's absence was only on that day and on earlier all occasions they had remained present before the court. Therefore the trial court ought to have appreciated these facts and adjourned the matter.

5. Shri. Amit Patel, learned counsel appearing for the respondent/accused submitted that the trial court has not committed any error and therefore the order impugned in the appeal deserves to be upheld as it is provided in Criminal Procedure Code that when the complainant is remaining

absent the trial court is empowered to dismiss the complaint. Shri. Patel has further submitted that, this being an acquittal appeal no interference should be made with the order of acquittal unless & until it is established that the order of acquittal has resulted into miscarriage of justice. Shri. Patel has relied upon a decision of the Apex Court in case of STATE OF PUNJAB Vs. AJAIB SINGH AND OTHERS, reported in (2005) 9 SCC, 94, in support of his submission that unless & until it is demonstrated by the appellant that the order impugned is perverse, the order of acquittal need not be interfered with. In the alternative, Shri. Patel has submitted that in case this Court is inclined to set aside the order impugned, appropriate cost may be awarded. Shri. Patel has submitted that the respondent would be required to undergo the rigmarole of criminal trial again and therefore appropriate cost be awarded to him.

6. Heard learned counsels of the parties and perused the records & proceedings of the case. The records & proceedings clearly indicate that the complainant had remained present on all occasions before the trial court. However on 22/11/2005 he could not remain present nor did his advocate remain present. Therefore the complaint came to be dismissed. The records & proceedings indicate that the cheque in question

had been issued and the complaint came to be dismissed when it was slated for recording evidence. The facts and the exchange of notices in reply go to show that the parties be given opportunity to lead their respective evidence in accordance with law. The impugned order dismissing the appeal has in fact rendered the complainant remediless so far as his case is concerned. This Court in case of KUMBHAR DHULABHAI KALUBHAI V. PATEL GANESHBHAI FULABHAI AND ANR, reported in AIR 1969 Guj. Pg. 176, has observed that the dismissal of the complaint in such a way when the complainant could not remain present for a day in itself would not be proper.

7. The order impugned, in my view is, therefore not tenable in eye of law in view of the aforesaid facts & circumstances of the case. The records & proceedings indicate that it would be absolutely in the interest of justice that both the parties be given an opportunity to lead their respective evidences in support of their respective stand. The matter therefore deserves to be remanded back to the trial court for disposing it of in accordance with law on merits. The fact remains that respondent has been subjected to various criminal proceedings and, therefore, appropriate cost deserves to be awarded while remanding the matter.

Looking to the peculiar facts &

circumstances of the case, this Court is of the view that the cost of Rs.2,500=00 (Rs. Two thousand five hundred only) be paid to the respondent/ accused.

8. In the result, the order impugned in this appeal is hereby quashed and set aside and the appeal is partly allowed. The matter is ordered to be remanded back to the trial court. The appellant herein is directed to deposit Rs.2,500=00 (Rs. Two thousand five hundred only) by way of cost to the respondent/ accused in the trial court and the same shall be permitted to be withdrawn by the respondent /accused. The trial court is hereby directed to dispose of the matter on merits after hearing learned counsels of the parties and after affording opportunity of leading their evidences. R & P be sent forthwith.

[S.R. BRAHMBHATT, J]

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